SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 1417

Supreme Court, U.S.
FILED
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SANDRA LEE SHERWOOD and
DANA S. SHERWOOD,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

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Sandra Lee Sherwood and
Dana S. Sherwood

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TABLE OF AUTHORITIES CITED

	Page
Crawford v. United States 212 U.S. 183	12
Dunn v. United States (5th Cir.1963), 318 F.2d 89	15
Fletcher v. United States (49 App.D.C. 1946),158 F2d 321	15
Freed v. United States (49 App.D.C. 1920), 266 F.1012	15 & 16
Hall v. United States (5th Cir. 1964),324 F.2d 877	15
McMillen v. United States (1st Cir. 1967), 386 F2d 29	14
On Lee v. United States 343 U.S. 747	13
Phelps v. United States (5th Cir. 1958), 252 F2d 49	15
United States v. Masino (2d Cir. 1960), 275 F2d 129	15
Washington v. Texas 388 U.S. 14 (1967)	14
Williamson v. United States 5th Cir. 1964), 332 F2d 123	13 & 15

STATUTES AND CODES

21 U.S.C. 331 (q) (2).	3

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners, Sandra Lee Sherwood and Dana S. Sherwood, respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to review its judgment affirming a judgment of the United States District Court for the District of Colorado, sentencing petitioner Sandra Sherwood to four years imprisonment and petitioner Dana S. Sherwood to five years imprisonment.

OPINION BELOW

Trial in the Federal District Court was by jury.

The opinion of the Court below is appended hereto as Appendix "A", and is also found in the Clerk's Record of the Circuit Court. The opinion of the Court below is, as yet, not reported. The judgment of the court below is contained in the Clerk's transcript from the Circuit Court.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment sought to be reviewed and the time of its entry is December 31, 1970. (R.C.A. Judgment).

A petition for an extension of time was filed and an order was issued granting an extension until March 1, 1971 reserving the right to consider whether the application has been timely filed.

The statutory provision believed to confer on this court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I

Petitioners were denied a fair trial as guaranteed by the Sixth Amendment to the Federal Constitution due to the fact that the only evidence against them was offered

by co-defendants who turned states's evidence to testify with their sentences being unduly delayed to coerce testimony favorable to the Government. Moreover, those same two former defendant-witnesses were impeached beyond question by written statements in their own handwriting admitting the innocence of petitioners; finally, the jury which convicted petitioners was never even told to "view with caution" the testimony of these accomplices.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved are the Sixth Amendment to the United States Constitution and 21 U.S.C. 331 (q) (2).

STATEMENT OF THE CASE

An indictment was filed in the Federal District Court of Colorado on August 8, 1969 charging petitioners and others, with the sale of LSD in count I and a conspiracy to sell LSD in count II. After being duly arraigned and pleading not guilty, the case ultimately came to trial before the Honorable Hatfield Chilson, Federal District Judge. After the Court dismissed count II on a motion for Judgment of Acquittal, the jury convicted both petitioners on count I. Petitioner Sandra Lee Sherwood was awarded a sentence of four years in prison and petitioner Dana S. Sherwood was sentenced

to five years in prison. A Notice of Appeal was timely filed. On December 31, 1970, the United States Court of Appeals for the 10th Circuit affirmed the judgment and after an extension of time granted until March 1, 1971 due to a change of counsel and other factors this petition was timely filed.

(Unless indicated to the contrary all page references are to the Reporter's transcript on Appeal.)

STATEMENT OF FACTS

The trial commenced on January 26, 1970 before the Honorable Hatfield Chilson, Federal District Judge.(2). Preliminarily, Attorney Henry for the Petitioners pointed out that two co-defendants, Fowler and Clevenger, had previously withdrawn their pleas of guilty on November 3rd -- over 11 weeks before this trial started -- and became witnesses for the prosecution. They had not been sentenced, however. Attorney Henry asked that they be sentenced without unreasonable delay so that they would not be testifying against the Petitioners with a threatening sentence hanging over their heads (4). The motion was denied and the trial formally commenced on its merits. (9).

The first witness for the Government was William J. Gowans, a forensic chemist employed by the Bureau of Narcotics and Dangerous Drugs (26-7). He identified Plaintiff's Exhibit 1 as an envelope which he had previously seen when it was delivered to a Government laboratory in San Francisco by registered mail. The envelope contained four tablets which proved to contain LSD (29-33).

Gowans then identified Plaintiff's 2 and 3 which were delivered to the San Francisco laboratory by registered mail on July 31st 1969.(33-4) They, too, contained LSD. (37-43).

The second Government witness was Jeffery M. Fowler, a former co-indictee(60). He testified that he pled quilty on a previous date to count one of the indictment, sale of LSD. (60). He conceded that he had not been sentenced and related that he had been offered no deals or promises by law enforcement for his cooperation. (61). He stated that he knew Dana and Sandy Sherwood, meeting them for the first time in March, 1969. On July 29th, 1969, he saw Dana Sherwood at Fowler's apartment and then saw Sandy later at her motel. (61). At approximately 10:00 A.M. on that date, Dana Sherwood came to his apartment on Logan Street and spoke with Fowler and his roommate Gary Clevenger. Another individual by the name of Joseph Wayne Newton was also present during the conversation.(62).. The conversation centered around the prospective sale of LSD to Federal agents although the fact that they were agents was not known at that time. An arrangement was entered into whereby Fowler and Clevenger would stop by Sandy's motel and retrieve the acid tabs after Dana had called her to verify the deal. Newton and Fowler then travelled

to the motel on East Colfax where Sandy resided.(67). They obtained the LSD from Sandy Sherwood contained in a Kleenex box, got back into the car and drove to the Center of Denver Motel where they met Agents Sherman and Newman.(70). Due to a mixup, Fowler brought along only half of the LSD and his roommate Clevenger came later with the rest.(70). At that point Fowler and Clevenger were arrested. (71).

On cross-examination, Fowler related that he had first met the Sherwoods in Texas in late March, 1970.(79). He lived there also and was a friend of theirs.(79). He had on occasions discussed the poster business with Dana Sherwood. (80). After his arrest, at sometime on or about August 1, 1969, in Denver, Colorado he addressed a statement, Defendant's Exhibit "C", which he wrote to a Los Angeles Attorney, John Frolich, former attorney for the petitioners. The letter completely exonerated the Sherwood's of any complicity in the sale of LSD and also contained the signature of Gary Alan Clevenger attesting to that fact.(91).

On redirect-examination, Fowler suggested that Attorney Frolich had suggested that the letter be written so as to keep petitioners' out of trouble since they had nothing to do with the sale of LSD and that the letter would also allow a prosecution against Fowler and

and Clevenger only under State law.(93).

The third Witness for the Government was Gary Alan Clevenger. (96). He testified to being a former co-indictee who pled guilty on an earlier date and was awaiting sentence. (96). He similarly related that no promises had been made to him by anyone. (97). His testimony was substantially in accord with his roommate's. (98). He admitted to having signed the exonerative letter-exhibit "C".(110-).

The next witness called by the Government was a Reverend Matthews who was friendly with the previous witnesses Fowler and Clevenger. (115). He stated that he was present at a conversation wherein Attorney John Frolich from Los Angeles suggested the writing of the letter (exhibit "C") and that it was implied that the writing of such a letter would foreclose effective Federal prosecution for dealing in LSD. He relayed a message to Fowler and Clevenger not to sign the letter. They nonetheless did so.(119).

Agent Zienter, a Narcotics Agent, testified to participating in a surveillance of the activities of Clevenger and Fowler. (120). He saw Fowler, Newton, Clevenger and Dana Sherwood exit the Logan Street address around 12:45 P. M. on July 29th. (121). They travelled to the Niagara Motel on Niagara and Colfax Streets in Denver.(122). He saw the above parties meet with Sandra Sherwood.

She exited the motel carrying a piece of luggage and then Newton and Fowler were observed to leave the location and were followed to a service station which they entered and then returned to the car; they next travelled to the Center Motel.(123). They entered the motel.(124).

The Agent then followed petitioners and arrested them.(124). At the scene of the arrest, Mr. Sherwood opened the driver's side of the car in which they had been riding and started to run but didn't get very far. (124).

The next Governmen. witness was Culver Davidson, owner of the Niagara Motel.(130). He identified Plaintiff's Exhibit No. 4 which was a motel registration card filled out for July 29, 1969 by Mrs. Judy Cooper. She was then identified as Sandra Sherwood. (131).

The next Government witness was Charles D. Sherman, employed by the Bureau of Narcotics and Dangerous Drugs. (133034). He testified that he and Deputy Sheriff William F. Newman effected the arrest of Fowler and Clevenger around 2:20 to 2:30 P.M. on July 29, 1969. (135). He testified to receiving the Kleenex box containing the LSD and to mailing it to the chemist in San Francisco. (136).

He also identified the other LSD similarly transmitted. (144-5).

The defense moved for a Judgment of

Acquittal which was granted as to the Conspiracy count (count two) and not as to the sale count (count one.) (148).

REASONS FOR GRANTING THE WRIT AND AMPLIFYING THE SAME

I

PETITIONERS WERE DENIED A FAIR TRIAL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE FEDERAL CONSTITUTION DUE TO THE FACT THAT THE ONLY EVIDENCE AGAINST THEM WAS OFFERED BY CO-DEFENDANTS WHO TURNED STATE'S EVIDENCE TO TESTIFY WITH THEIR SENTENCES BEING UNDULY DELAYED TO COERCE TESTIMONY FAVORABLE TO THE GOVERNMENT: MOREOVER, THOSE SAME TWO FORMER DEFENDANT-WITNESSES WERE IMPEACHED BEYOND QUESTION BY WRITTEN STATEMENTS IN THEIR OWN HANDWRITING ADMITTING THE INNOCENCE OF PETITIONERS; FINALLY, THE JURY WHICH CONVICTED PETITIONERS WAS NEVER EVEN TOLD TO "VIEW WITH CAUTION" THE TESTIMONY OF THESE ACCOMPLICES.

As indicated in the statement of facts the entire case against petitioners was predicated upon the testimony of two former co-defendants and admitted accomplices, Fowler and Clevenger. It is manifest that without their testimony the evidence would not justify a conviction. Those witnesses were severely impeached when it was brought to light that they had jointly addressed a letter to Petitioners' former attorney in Los Angeles

admitting that neither Petitioner was culpable. (R.T. 91, 110.).

Moreover, their sentences were delayed so that the sword of Damocles would continue to swing over their heads until they had fulfilled their prosecutorial chores by denouncing their prior written statements as falsehoods. (R.T. 4-9).

In view of the above, there is a serious question as to whether any Court in the Federal system should allow the conviction to stand. But significantly, even with accomplice testimony serving as the evidence for the prosecution with the grave impeachment, no, we repeat, no instruction was furnished the jury suggesting that the testimony of the accomplices who admitted having fabricated statements in advance of trial should be viewed with distrust or even care or caution.

The trial court failed to instruct the jury, as is traditionally done, that the testimony of an accomplice "is always to be received with caution and weighed with great care". (See Mathes & Devitt, Federal Jury Practice and Instructions 9.04).

As long ago as 1909, the Supreme Court observed that accomplice testimony "ought to be received with suspicion and with the greatest of care and caution". (Crawford v. United States, 212 U.S. 183, 204; 29 S. Ct. 260,268). In 1952 this Court cited as a

modern trend the admission of accomplice testimony but subject to "broad latitude" in cross-examination and "careful instructions". (On Lee v. United States, 343, U.S. 747, 757; 72 S. Ct. 967.)

Williamson v. United States (5th Cir. 1964) 332 F2d 123, involved the prosecution of a bank officer who was implicated through the testimony of an accomplice. Although no request was made for an "accomplice instruction", the Court nevertheless reversed the judgment of conviction for failure to give the instruction and observed:

> "In the final analysis, it is not the parties who determine the charge the judge gives to the jury. The obligation rests squarely on the shoulders of the trial judge.... We think the omission of the charge on accomplice testimony was plain error, and the only way to eradicate it is to grant a new trial." At 132, 133.

The Court of Appeals, in Williamson, supra, recognized the reason for giving the cautionary accomplice instruction. While acknowledging the necessity for the government's use of the testimony of lawbreakers and participants in the very crimes under scrutiny, the Court stated:

> "But law is in step with human nature when it ordinarily recognizes that test-

> ...mony from this course (sic) has to be scrutinized most carefully. ...that results normally in the giving of a traditional instruction."

This Court has recently expounded in Washington v. Texas, 388 U.S. 14, 22 (1967):

> "Common sense would suggest that (an alleged accomplice) often has a greater interest in lying in favor of the prosecution rather than against it, especially is he ... still awaiting his own trial or sentencing. To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large."

Finally, in McMillen v. United States (1st Cir. 1967) 386 F2d 29, this court reversed a judgment of conviction for giving the presumption of truthfulness instruction as applied to the testimony of witnesses combined with failure to give a cautionary instruction as to testimony of an accomplice although no requests for or objections to the court's instructions were made. The Court stated:

> "We are not here concerned with technical error or with prejudicial error, or even with our view of what

we may deem to be the obvious guilt or innocence of the individual appellants. In the words of the Federal Rules of Criminal Procedure 52(b) we are concerned only with any errors "affecting substantial rights". As the Supreme Court stated in United States v. Atkinson, 297 U.S. 157, . . . we may - and we must - notice errors which "seriously affect the fairness" of judicial proceedings'," at page 35.

And the cautionary accomplice instruction been requested, it appears clear that it would have been reversible error to decline to give it. Gillespie v. United States (5th Cir. 1964) 332 F2d 143; Forbes v. United States (5th Cir. 1958) 252 F2d 49; Creed v. United States (49 App. D.C. 1920), 266 F. 1012; Fletcher v. United States (49 App. D.C. 1946), 158 F2d 321.

We most respectfully submit that the trial court committed "plain error" in failing to instruct the jury per the language of the accomplice instruction suggested in Mathes & Devitt, Federal Jury Practice and Instructions Section 9.04.

See also Hall v. United States (5th Cir. 1964), 324 F2d 817; Lund v. United States 5th Cir. 1963), 318 F2d 89; United States v. Casino (2d Cir. 1960), 275 F2d 129; Fletcher v. United States (81 U.S. App. D.C. 306 1946),

158 F2d 321; Freed v. United States (49 App. D.C. 392), 266 F. 1012.

CONCLUSION

The petition for writ of certiorari, petitioners respectfully pray, should be granted and the judgment reversed.

Lull McIntosh

LULL McINTOSH
Attorney for petitioners

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

November Term, 1970

FILED
United States Court of Appeals
Tenth Circuit
DEC 31 1970
HOWARD K. PHILLIPS
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SANDRA LEE SHERWOOD and
DANA S. SHERWOOD,

Defendants-Appellants.

No. 238-70
No. 239-70

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Lawrence M. Henry for Appellants.

Gordon L. Allott, Jr., Assistant United States Attorney, (James L. Treece, United States Attorney, Denver, Colorado, was with him on the brief) for Appellee.

Before LEWIS, Chief Judge, JOHNSEN* and HOLLOWAY, Circuit Judges.

LEWIS, Chief Judge.

* Of the Eighth Circuit, sitting by designation.

Defendants, together with three other persons, were jointly indicted and charged in two counts with the unlawful sale of and conspiracy to sell LSD in substantive violation of 21 U.S.C. § 331(q)(2). The charge of conspiracy was subsequently dismissed; all defendants except the Sherwoods pleaded guilty to the substantive count and received varying sentences; the Sherwoods were convicted after trial to a jury and now appeal from the judgments and sentences urging the existence of several prejudicial trial errors and a "lack of fair play" to them through the sentencing procedures accorded their co-defendants.

Two of the co-defendants, Fowler and Clevenger, testified at trial against the Sherwoods and in so doing recanted earlier statements that the Sherwoods were not involved in the sale of the contraband drug. At time of trial both Fowler and Clevenger had entered guilty pleas some eleven weeks earlier but were not yet sentenced. The Sherwoods contend the trial court abused its discretion in not granting a trial continuance until after the witnesses were sentenced. 1/

Rule 32(a)(1), Rules of Criminal Procedure, provides that sentence must be imposed "without unreasonable delay" and extreme delay may cause a deprivation of the right to speedy trial. See Pollard v. United States, 352

1/ The sentencing judge was not the trial judge.

U.S. 354, 361. However, these rights are those peculiar to the person subjected to the process and are not the rights of third persons. In the case at bar the judicial procedural status of the witnesses Fowler and Clevenger could well premise an argument as to their credibility but, absent circumstances not here claimed, can rise to no higher significance. Indeed, delay of sentencing to permit a convicted defendant to later testify has been held not to be impermissible, even when the defendant was the complaining party. Welsh v. United States, 6 Cir., 348 F_2 885.

Next the appellant defendants complain of the comments and instructions of the trial court to the effect that a variation of the proof from the allegation contained in the indictment concerning the quantity and quality of the involved drug was "no defense" and that defense counsel's argument concerning the failure of the government to call a subpoenaed witness was "without merit" because such witness was equally available to the defense. The quoted phrases when considered in isolation are indeed blunt but the totality of the court's instructions and comments is both legally accurate and well contained within judicial discretion.

Finally, appellant defendants assert that the evidence does not support their convictions, a claim completely negatived by the record, and that their arrests

were illegal. Assuming arguendo this to be true, it alone would not vitiate the jurisdiction acquired by the district court. Frisbie v. Collins, 342 U.S. 519; see also Hobson v. Crouse, 10 Cir., 332 F_2 561.

AFFIRMED.

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 6430 Sunset Boulevard, Suite 521, Hollywood, California 90028. On March 1, 1971 I served the within Petition for Writ of Certiorari on the plaintiff and respondent in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

United States Attorney
323 U.S. Court House
P. O. Box 1776
Denver, Colorado 80201

United States Court of Appeals
Tenth Circuit
Federal Building
Denver, Colorado 80201

Solicitor General
Department of Justice
Washington, D.C. 20530

I declare that the foregoing is true and correct.

Executed on March 1, 1971, at Los Angeles, California.

Barbara Hunter

Barbara Hunter

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1417

SANDRA LEE SHERWOOD AND DANA S. SHERWOOD,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were convicted in the District Court of Colorado of selling L.S.D. in violation of 21 U.S.C. (Supp. V) 331(q)(2). Both were sentenced to imprisonment, petitioner Sandra Sherwood for four years, petitioner Dana Sherwood for five. The court of appeals affirmed the convictions.

Petitioners claim that their convictions should be set aside because the principal evidence against them consisted of testimony by co-defendants who pleaded guilty [1] but had not been sentenced at the time of trial

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[1] As noted in the petition (Pet. 8–9) a narcotics agent saw the co-defendants meet the petitioners, as the co-defendants testified.

419-912—71

and who had previously signed a letter exonerating petitioners from implication in the crime.[2] All these facts, including the co-defendants' explanation about why they signed the letter, were brought before the jury. The jury was entitled to believe the co-defendants, whose testimony was corroborated by another witness in significant respects (see Pet. 8).[3] The fact that the co-defendants had not yet been sentenced was merely one factor the jury could consider in assessing their credibility. *United States* v. *Boswell,* 372 F.2d 781, 784 (C.A. 4), certiorari denied *sub nom. Hellams* v. *United States,* 387 U.S. 919.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1971.

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[2] The sentencing judge for the co-defendants was not the trial judge for petitioners. (Pet. App. 2.)

[3] Petitioners also argue that the district court committed plain error in failing to instruct that testimony of accomplices should be viewed with caution, even though there was no request for such instructions. Since the facts tending to impeach the witnesses in this simple case were fully developed, the failure of the court *sua sponte* to give such an instruction does not amount to plain error. The case of *Williamson* v. *United States*, 332 F.2d 123 (C.A. 5), on which petitioners rely, turns on its special facts. See *Caldwell* v. *United States*, 405 F.2d 613, 615 (C.A. 9), certiorari denied, 394 U.S. 1004.

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